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NO. PD-748-17

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
3/22/2018
DEANA WILLIAMSON, CLERK

KELSEY JO LACKEY

v.

THE STATE OF TEXAS

On Discretionary Review From the
Waco Court of Appeals
Cause No. 10-17-00016-CR

APPELLANT'S MOTION FOR REHEARING

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Statement of the Case

The trial court denied Appellant's two motions to quash the indictment. (CR13, 14) Thereafter, Appellant pleaded guilty to 2 counts of felony theft. (CR219-26) The trial court sentenced Appellant to 3 years' imprisonment on one count and 10 years' community supervision on the other count. (CR267-68, 303-04) Appellant sought to appeal the adverse rulings on the motions to quash. (CR213-14)

The Waco Court of Appeals dismissed the appeal in an opinion authored by Justice Scoggins. Chief Justice Gray dissented. *Lackey v. State*, No. 10-17-00016-CR, 2017 WL 1148239 (Tex. App.—Waco Mar. 20, 2017). Appellant timely filed a motion for rehearing. After requesting a response and receiving same, the Waco Court denied Appellant's motion for rehearing with Chief Justice Gray dissenting.

This Court granted discretionary review and ordered briefing on the merits. The Court briefly set the matter for submission with oral argument. The Court then removed the case from the submission docket. The Court dismissed the petition as improvidently granted one week later.

Grounds for Rehearing

1. The Court should grant rehearing to re-affirm the long-recognized right to appeal the issue of whether a waiver of appeal is valid and enforceable.

2. The Court should grant rehearing to affirm that the certification requirement of Rule 25.2(d) presents no barrier to this appeal

3. The Court should grant rehearing to re-affirm that hypertechnical compliance is not required and is in fact contrary to the appellate rules and this Court's decisions.

4. The Court should grant rehearing and exercise its law-development function to address the proper procedures for challenging the validity of waivers of appeal and defective or disputed trial court certifications on direct appeal because these issues regularly recur in appellate proceedings and this area of the law is unsettled.

5. The Court should grant rehearing as a matter of judicial economy.

Summary of the Argument

A majority of the justices of the Waco Court of Appeals dismissed Mr. Lackey's appeal without even consulting the entirety of the trial record. As argued in the brief, the entirety of the record contains conflicting information that demonstrates that Mr. Lackey's boilerplate waivers of appeal are involuntary and unenforceable.

This Court initially recognized the significance of the issue and sub-issues presented, ordered briefing on the merits and even set the appeal for submission with oral argument. But ultimately the Court dismissed the petition as improvidently granted.

The issues presented are no less important to the jurisprudence of the State even though there are some procedural hurdles that still must be resolved regarding the appellate record.

Mr. Lackey urges the Court to grant rehearing and: (1) reaffirm that an appellant may challenge the voluntariness of his waiver of appeal on direct appeal; (2) affirm that an appellant may challenge a defective trial court certification on appeal; (3) reaffirm that hypertechnical compliance is not the standard for determining whether a defendant has the right to appeal; (4) exercise its law development function to resolve an unsettled area of the law

that is important to the jurisprudence of the State; (5) preserve the scarce judicial resources of the trial court and of this Court; and (6) establish the proper procedures for the parties and the appellate court to follow in such an appeal.

Argument

Issue Presented: Did Appellant voluntarily, knowingly and intelligently waive his right of appeal by signing boilerplate waivers?.

The Court has long held that an appellant may challenge the validity of his waiver of appeal on direct appeal. Mr. Lackey is pursuing just such an appeal. The Court should grant rehearing to: (1) reaffirm that an appellant on direct appeal may challenge the voluntariness of his waiver of appeal either with the trial court's permission or by providing a sufficient record to demonstrate that the waiver is involuntary; (2) affirm that an appellant may challenge the correctness of a trial court certification in the court of appeals; (3) reaffirm that hypertechnical compliance is not the standard for determining whether a defendant has the right to appeal; (4) exercise its law development function to resolve an unsettled area of the law that is important to the jurisprudence of the State; (5) preserve the scarce judicial resources of the trial court and of this Court; and (6) establish the proper procedures for the parties and the appellate court to follow in an appeal where the defendant has challenged the voluntariness of a boilerplate waiver of appeal yet the trial court has denied permission to appeal.

A. The Court should uphold the long-recognized right to appeal the issue of whether a waiver of appeal is valid and enforceable.

Texas courts have long recognized that a defendant who has signed a waiver of appeal may nevertheless appeal: (1) with the trial court's permission; or (2) by challenging the validity of the waiver on appeal.

Such appeals, when pursued with the trial court's consent, have been frequently approved. *E.g., Monreal v. State*, 99 S.W.3d 615, 622 (Tex. Crim. App. 2003); *Reed v. State*, 516 S.W.2d 680, 682 (Tex. Crim. App. 1974). The second type of appeal is a more unusual proceeding.

In the words of former Judge Johnson,

> This Court has . . . long held that where a valid waiver exists, regardless of whether there was a plea agreement with the state, a defendant who wishes to appeal must either receive the permission of the trial court **or prove to the court of appeals that the waiver was coerced or involuntary**.

Monreal, 99 S.W.3d at 624 (Johnson, J., concurring) (emphasis added).

Judge Johnson cited several supporting authorities, but Mr. Lackey calls the Court's attention to one in particular—*Ex parte Hogan*, 556 S.W.2d 352 (Tex. Crim. App. 1977). There, the defendant filed a notice of appeal after

having waived appeal with consent of counsel. The trial court construed[1] the notice of appeal as a postconviction writ challenging the voluntariness of the waiver but found that the waiver had been made voluntarily. *Id.* at 353.

This Court dismissed the writ because the applicant failed to alleged facts in the notice of appeal showing that the waiver was involuntary and the record did not support a finding of involuntariness. *Id.*

> [T]he notice of appeal does not allege facts that, if proven, would show the waiver was coerced or involuntary. Furthermore, there is nothing in the record suggesting involuntariness that would support sua sponte consideration of the issue. For want of an allegation of facts that, if true, would entitle petitioner to relief, the cause is dismissed.

Id.

The Court thus recognized that a defendant could challenge the voluntariness of his waiver of appeal by: (1) alleging facts in the notice of appeal demonstrating that the waiver was involuntary; or (2) providing a sufficient record from which it could be determined that the waiver was involuntary.

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[11] The trial court also considered this pleading as a notice of appeal and concluded that: (1) no good cause was shown for its filing; (2) permission to withdraw the waiver of appeal was denied; and (3) the notice failed to effectively initiate an appeal. *Ex parte Hogan*, 556 S.W.2d 352, 353 (Tex. Crim. App. 1977)

Mr. Lackey's appeal is precisely this type of appeal. Although his written notice of appeal did not challenge the validity of his boilerplate waivers,[2] the entirety of his appellate arguments to-date have been directed toward identifying for the appellate courts those parts of the record that show his boilerplate waivers are involuntary and unenforceable.

The Court should grant rehearing to: (1) reaffirm that an appellant on direct appeal may challenge the voluntariness of his waiver of appeal either with the trial court's permission or by providing a sufficient record to demonstrate that the waiver is involuntary; and (2) establish the proper procedures for the parties and the appellate court to follow in such an appeal.

B. The certification requirement of Rule 25.2(d) presents no barrier to this appeal.

Rule 25.2(d) requires a trial court to enter a written certification of the defendant's right of appeal and requires dismissal of the appeal if a certification that the defendant has a right of appeal is not included in the record. TEX. R. APP. P. 25.2(d). Rule 25.2(f) then provides for amending a

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[2] Under the current appellate rules, it is unnecessary to allege facts that demonstrate appellate jurisdiction. *See* TEX. R. APP. P. 25.2(c); *Harkcom v. State*, 484 S.W.3d 432, 434 (Tex. Crim. App. 2016) (no "magic words" necessary to perfect appeal).

defective certification and for challenging an amended certification. *Id.* 25.2(f).

However, Rule 25.2(f) does not create a preservation requirement for defects in an amended certification.[3] *Marsh v. State*, 444 S.W.3d 654, 659 (Tex. Crim. App. 2014).

And further, Rule 25.2(d) does not require automatic dismissal of the appeal on receipt of a certification indicating the defendant has no right of appeal. If a court of appeals has the appellate record before it, the court is "obligated to review that record in ascertaining whether the certifications [are] defective." *Dears v. State*, 154 S.W.3d 610, 615 (Tex. Crim. App. 2005); *accord Marsh*, 444 S.W.3d at 659. But an appellate court has no duty to sua sponte determine the correctness of a certification unless a party suggests that the certification is defective. *See Menefee v. State*, 287 S.W.3d 9, 12 n.12 (Tex. Crim. App. 2009) (citing 43A GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 43:287 (2d ed. Supp. 2008-2009)); *accord Marsh*, 444 S.W.3d at 659; *see also* 43B GEORGE E.

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[3] The State has argued that Mr. Lackey waived any complaint regarding the correctness of the amended certification because he failed to file a motion under Rule 25.2(f) challenging this document. Under *Marsh*, this contention is meritless.

DIX. & JOHN M. SCHMOLESKY, TEXAS PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 55:33 (3d ed. 2011).

Presiding Judge Keller (joined by Judges Keasler and Hervey) observed in her dissenting opinion in *Menefee* that the Court was failing to address an important issue regarding an obviously defective trial court certification which ultimately affected the Court's jurisdiction. *See Menefee*, 287 S.W.3d at 22 (Keller, P.J., dissenting). The issues presented here are similar to those that concerned the dissenting judges in *Menefee* and remain largely unresolved. *See* DIX & SCHMOLESKY § 55:33 (noting the "uncertainties in the law").

This Court has on at least one occasion granted review in a direct appeal where the trial court certification reflected that the defendant had no right of appeal. *See Washington v. State*, 363 S.W.3d 589 (Tex. Crim. App. 2012) (per curiam). The defendant had signed a waiver of appeal. *Id.*at 589. But this Court concluded that the wavier of appeal was not valid and remanded to the court of appeals for consideration of the merits of the appeal. *Id.* at 590.

Here, the court of appeals relied solely on the amended trial court certification (which Mr. Lackey has consistently challenged as defective) to

dismiss the appeal. Mr. Lackey has urged that court and this Court in his pleadings to consider the totality of the appellate record and then conclude that his boilerplate waivers of appeal are involuntary and unenforceable.

The Court should grant rehearing to: (1) affirm that an appellant may challenge the correctness of a trial court certification in the court of appeals; and (2) establish the proper procedures for the parties and the appellate court to do so—particularly, the need to consider both the clerk's record and the reporter's record.[4] *See Ex parte De Leon*, 400 S.W.3d 83, 87 (Tex. Crim. App. 2013) (court considered "totality of record" in evaluating validity of boilerplate waiver of appeal).

C. The Court should re-affirm that hypertechnical compliance is not required and is in fact contrary to the appellate rules and this Court's decisions.

The appellate rules were amended in 2002 to prevent the dismissal of appeals for trivial or hypertechnical procedural defects that can be corrected.

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[4] Mr. Lackey understands that the trial court certification was designed to streamline the appellate process and weed out procedurally-barred appeals. Following a trial on the merits, a similar complaint might involve a lengthy trial record. But in the context of plea proceedings as here, the entirety of the reporter's record consists of brief hearings that do not require any significant period of time to review. So requiring the filing of the reporter's record in this type of case will not result in an unduly extended appellate process.

The dismissal of the PDR in this case has *sub silentio* embraced the lower court's dismissal of Mr. Lackey's appeal for just such a trivial, correctable defect.

This Court has repeatedly stated that appeals should not be dismissed on such flimsy grounds.

> The Texas Rules of Appellate Procedure were amended in 2002 to prevent trivial, reparable mistakes or defects from divesting appellate courts of the jurisdiction to consider the merits of both state and defense appeals in criminal cases. The Rules of Appellate Procedure should be construed reasonably, yet liberally, so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule.
>
> A person's right to appeal a civil or criminal judgment should not depend upon traipsing through a maze of technicalities.

Harkcom v. State, 484 S.W.3d 432, 434 (Tex. Crim. App. 2016) (citing *Few v. State*, 230 S.W.3d 184, 187, 189-90 (Tex. Crim. App. 2007); *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997)).

In addition to the *Few* decision, the Court also echoed this approach in *Gonzalez v. State*, 421 S.W.3d 674 (Tex. Crim. App. 2014), in which this Court

reversed the same court of appeals[5] for dismissing an appeal based on what the lower court viewed as an uncorrectable, defective notice of appeal which had omitted one of four trial court cause numbers after a consolidated trial. *Id.* at 675.

Once again, the Waco Court of Appeals has chosen to exalt technical compliance over a reasonable construction of the appellate rules that, in this instance, would preserve Mr. Lackey's right to appeal.

The Court should grant rehearing to: (1) reaffirm that hypertechnical compliance is not the standard for determining whether a defendant has the right to appeal; and (2) establish the proper procedures for the parties and the appellate court to follow in an appeal where the defendant has challenged the voluntariness of a boilerplate waiver of appeal yet the trial court has denied permission to appeal.

D. The Court should exercise its law-development function.

Courts of last resort employ prudence in the exercise of their appellate jurisdiction. Mr. Lackey recognizes that this Court has limited resources and

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[5] *See Gonzales v. State*, No. 10-13-00122-CR, 2013 WL 3481993 (Tex. App.—Waco July 11, 2013), *rev'd*, 421 S.W.3d 674 (Tex. Crim. App. 2014).

exercises its jurisdiction sparingly but urges the Court to exercise its jurisdiction here to address issues that are important to the jurisprudence of this State.

Appellate courts generally exercise their jurisdiction to serve two basic functions:

> (1) the error correction function, which involves "reviewing trial court proceedings to determine whether they have been conducted according to law and applicable procedure," and
>
> (2) the law development function, which involves "developing the rules of law that are within the competence of the judicial branch to announce and interpret."

Andrew T. Solomon, *The Texas Supreme Court's Petition System: A System in Need of Reexamination*, 53 S. TEX. L. REV. 695, 704 (2012) (footnote and citations omitted).

Courts of last resort typically choose to exercise their discretionary jurisdiction for one of three reasons.

> The first and most straightforward reason for granting review is to secure "uniformity of decision" and thereby ensure that lower courts have a consistent body of law to follow. For that reason, the high court is more likely to review an intermediate appellate court decision when that decision conflicts with the decision of another intermediate court of appeals. The second primary reason why a high court grants review is to resolve cases of general importance. This second class of cases often involves important, yet unsettled, legal questions. Finally, a high court

> grants review when it believes the lower court erred in light of other decisions by the high court. So, this third class of cases attempts to minimize error or injustice created by lower courts.

Solomon, 53 S. TEX. L. REV. at 710-11 (footnotes omitted); *see also* TEX. R. APP. P. 66.3 (specifying reasons for granting review).

Review should be granted both for error-correction purposes and for law-development purposes. Yet the larger issue here is that resolution of the issue presented is vitally important to the jurisprudence of this state.

The parties have cited countless cases on both sides of these issues that demonstrate the repeated occurrence of similar issues concerning the validity of boilerplate waivers and defective or disputed trial court certifications.

The Court should grant rehearing because the issue presented is important to the jurisprudence of the state, the majority of the court of appeals decided the issue in a manner that is contrary to this Court's decisions (*e.g., Harkcom*), the justices of the court of appeals disagreed on the issue presented, and the majority of the lower court "so far departed from the accepted and usual course of judicial proceedings" that this Court must exercise its power of supervision. *See* TEX. R. APP. P. 66.3. At bottom, the

Court should grant rehearing to exercise its law development function and settle the law regarding the issue and sub-issues presented.

E. Judicial economy suggests that the issues presented should be resolved on direct appeal rather than by postconviction writ.

The enforceability of a waiver of appeal has regularly been litigated in postconviction habeas proceedings. It certainly can be here, but must it?

A postconviction writ begins with the trial court who will be required to make findings regarding the enforceability of the boilerplate waivers of appeal. Yet the trial court has already made clear his opinion on the subject in the post-sentencing hearing on the State's motion to amend the trial court certification.

There is nothing to be gained by requiring Mr. Lackey to go to the additional time and expense of filing a postconviction habeas application that will ultimately add yet another postconviction writ to this Court's already crowded docket. So in addition to adding to the costs to be borne by Mr. Lackey, requiring a writ under these circumstances will require additional proceedings in the trial court and in this Court, thus expending already scarce judicial resources.

With minimal additional time or expense, the Court can have before it the entire trial record. The Court will readily see from the post-sentencing hearing that the trial judge has already made up his mind about the validity of the boilerplate waivers.

Judicial economy dictates that the Court address the issue presented now rather than in a postconviction writ proceeding.

The Court should grant rehearing to preserve the scarce judicial resources of the trial court and of this Court.

F. Significant circumstances justify this request for rehearing.

It is unclear whether the certification requirement of Rule 79.2 applies when a petition for discretionary review has been dismissed as improvidently granted. But out of an abundance of caution, counsel has included the requisite certification at the conclusion of this motion and offers the following to expand upon the significant circumstances that justify this motion for rehearing.

A criminal defendant has a statutory right of appeal. TEX. CODE CRIM. PROC. art. 44.02. This right includes the right to challenge on direct appeal the voluntariness of a boilerplate waiver of appeal. *See Monreal*, 99 S.W.3d at 624 (Johnson, J., concurring) (citing *Hogan*, 556 S.W.2d at 353). The decision

of the court of appeals in conjunction with this Court's dismissal of the PDR collectively operate to deny Mr. Lackey his right of appeal and thereby effectively deny him due process. *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (when a state chooses to confer a right not constitutionally required [like the right of appeal], "it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause").

The issue and sub-issues presented here have consistently resurfaced in various forms in the numerous cases cited by the party. This area of the law is unsettled. The Court should grant rehearing and grant review to provide clarity for the jurisprudence of the State.

Finally, significant circumstances justify rehearing for each of the reasons listed above specifying why the Court should grant rehearing.

Prayer

WHEREFORE, PREMISES CONSIDERED, Appellant Kelsey Jo Lackey asks the Court to: (1) grant rehearing; (2) withdraw its opinion and judgment issued March 7, 2018; (3) direct the supplementation of the record so that the entire appellate record is properly before the Court; (4) submit this appeal for decision on the issue presented in the briefs; and (5) grant such other and further relief to which he may show himself justly entitled.

Respectfully submitted,

/s/ Alan Bennett
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Certificate of Compliance under Rule 9.4

The undersigned hereby certifies, pursuant to Rule of Appellate Procedure 9.4(i)(3), that this pleading contains 4,148 words.

/s/ Alan Bennett
E. Alan Bennett

Certification under Rule 79.2

The undersigned hereby certifies, pursuant to Rule of Appellate Procedure 79.2(c), that this motion for rehearing from the dismissal of a PDR as improvidently granted is grounded on other significant circumstances described in more detail in the motion. Counsel further certifies that this motion is made in good faith and not for delay.

/s/ Alan Bennett
E. Alan Bennett

Certificate of Service

The undersigned hereby certifies that a true and correct copy of this motion was served electronically on March 22, 2018 to: (1) counsel for the State, Douglas Howell, III, dhowell@brazoscountytx.gov; and (2) the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Alan Bennett
E. Alan Bennett